IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 252

SAMUEL CHAPMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Seventh Circuit
And Brief in Support Thereof.

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STATUTES INVOLVED.

Internal Revenue Code, Sec. 145 (b) "26 U. S. C. A. Sec. 145 (b)"

"Any person required under this chapter to collect, account for, and pay over any tax imposed by

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this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

UNITED STATES CONSTITUTION.

RULES OF COURT.

TEXTBOOKS CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No.

SAMUEL CHAPMAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Samuel Chapman, respectfully represents unto this Honorable Court, as follows:

I.

Summary Statement of the Matter Involved.

The Petitioner, Samuel Chapman, was convicted of wilfully attempting to defeat and evade payment of a large part of the income tax due and owing by him to the United States Government for the calendar year 1943. The trial court sentenced him to a year and a day in the penitentiary and fined him $10,000. The United States Circuit Court of Appeals for the Seventh Circuit affirmed the conviction.

There are several very important legal questions in this case never before determined in an income tax matter. The case was presented by the Government as a "net worth" case based upon the expenditures of the Petitioner for the year 1943; Petitioner filed an income tax return for that year, showing an income of $90,124.16 with tax due and owing thereon of $60,355.36. The indictment set forth that the Petitioner's income for the calendar year 1943 was $300,739.98 with a total tax due and owing thereon of $253,574.82. The indictment also set forth the identical gross income and deductions listed in the Petitioner's tax return and added an additional item for gross income listed as "other income" in the amount of $282,115.82. (Tr. 2-3) The Petitioner listed as part of his $90,124.16 income, the sum of $71,000. as miscellaneous income.

On the trial, the Government offered evidence to show income by the Petitioner from over-ceiling side payments of meat of about $7,000., or approximately 10% of his reported miscellaneous income. This was the only proof offered by the Government as to taxable income and the Petitioner contends that before he can be convicted for failure to report or pay a tax, the burden is upon the Government to show that he had income in excess of the amount reported. This is one of the important legal questions to be determined from an income tax standpoint and and to the best of our knowledge such a question has never before been decided in the United States.

The Government attempted to prove excessive expenditures for the year 1943 and showed that the Petitioner bought a farm and spent money for improvements and livestock during that year amounting to over $300,000. It then became necessary for the Government to prove the Petitioner's "net worth" on January 1, 1943 in order to

show that he was financially unable to spend such a large amount of money, and therefore raise the presumption that it must have been income. The next important legal question from an income tax standpoint is immediately presented, because the Revenue Agent making the investigation was unable to establish a starting point to set up a "net worth" because the Petitioner had a safety deposit box for many years and the Agent was unable to determine whether or not there was any cash in the box. The Agent testified that he had an oral conversation with the Petitioner and the Petitioner is alleged to have said he had no cash on January 1, 1942 and the Agent proceeded to set up his "net worth" as of January 1, 1942 without showing any cash whatsoever. The question is whether or not the Agent's testimony regarding an admission alleged to have been made by the Petitioner, uncorroborated, is sufficient to establish a starting point and bring about a conviction of the Petitioner, for without a starting point there can be no "net worth" case.

The United States Circuit Court of Appeals for the Seventh Circuit in its opinion admits that the law in the United States holds that a Defendant cannot be convicted by an uncorroborated statement of anyone, yet affirms the conviction of the lower Court. An eye-witness testified that the Petitioner had at least $225,000. in cash in a safety deposit box in February of 1943, and that he saw it; and other witnesses who were present at the conversation related by the Revenue Agent denied that he asked the Petitioner if he had any cash or that the Petitioner said he did not. These same persons testified before the Grand Jury and gave substantially the same testimony.

Throughout the case the term "declared available resources" is used, yet there can be no such thing unless the

alleged oral admission of the Petitioner to the Revenue Agent is taken as a declaration of available resources.

Another important matter never before decided in a "net worth" case is whether or not a Revenue Agent can set up a starting point and arbitrarily cover a two-year period, as in this case. In other words, the Agent began with January 1, 1942, on the assumption that the Petitioner had no cash on hand, and added to it the Petitioner's income as reported on his tax return for 1942, to establish a "net worth" for January 1, 1943, and then proceeded to find that all the money the Petitioner spent in 1943 was income without in any way inquiring into the Petitioner's "net worth" on January 1, 1943. The important legal question on this point is whether or not the Revenue Agent has the right to compute a two-year period and arbitrarily declare the first year to be correct and the second year to be wrong.

Before trial the Petitioner moved for a Bill of Particulars asking that the Government be required to break down the item of "other income" in the amount of $282,115.82, and the Government filed a Bill of Particulars stating, "it is prepared to prove that the defendant expended over reported income the amount alleged in the indictment. • • • The Government states, that it does not possess the information necessary to specify in detail the amount of each and all individual items of income making up the total and aggregate amount of $282,115.82, or by whom each specific item making up this aggregate amount was paid to the defendant, or the character, manner of payment and the amount paid. The Government, therefore, is unable to specify particulars as to the information sought by the defendant." (Tr. 10).

The Petitioner then moved to dismiss the indictment on

the ground that the Bill of Particulars nullified and voided the indictment, by showing on its face that the Government had no information as to "other income", and the mere fact that the defendant expended over reported income, the amount alleged in the indictment, does not constitute a crime. Before the motion to dismiss was heard, the Government moved for leave to file an amendment to the Bill of Particulars (Tr. 19) and a supplemental Bill of Particulars (Tr. 20). By the amendment to the Bill of Particulars the stating part of which read, "that the defendant expended over reported income the amount alleged in the indictment," was amended to read, "that the defendant expended during the calendar year 1943 an amount in excess of the total of his available declared resources." The supplemental Bill of Particulars stated, "That the source of the 'other income', as alleged in the indictment, was the illegal sale of meat and meat products at over-ceiling prices to various persons by and on behalf of said defendant. That the details as to the source of said 'other income', are matters that lie peculiarly within the knowledge of the said defendant." The trial court overruled the motion to dismiss the indictment and denied a more specific Bill of Particulars (Tr. 21.).

This question involves a novel point of pleading in a criminal case, for the Government admitted in its Bill of Particulars that it had no information as to the "other income" set forth in the indictment and then tried to correct the Bill of Particulars after the motion to dismiss was made by stating that the matter of other income was peculiarly within the knowledge of the Petitioner. The only reported decisions on the point hold that the indictment should have been dismissed because of the admission of the Government that it had no knowledge upon which to indict the

Petitioner. This Honorable Court has never passed on the point.

The Petitioner was President of the Empire Packing Company of Chicago, and the Government sought to prove that he received side payments for the sale of meat belonging to the Empire Packing Company. The defendant contended that if such were the case, the proceeds of any such sale would belong to the Empire Packing Company, a corporation, and would not be taxable income to him, relying upon the decision of this Honorable Court in the *Wilcox* case.

The Circuit Court of Appeals for the Seventh Circuit ruled adversely on all of these questions and failed to rule at all on the question of whether or not the Peitioner received a fair and impartial trial and whether or not the statements of the District Attorneys were prejudicial and inflammatory, designed to arouse the passion and prejudice of the Jury.

II.

A Statement Particularly Disclosing a Basis of Jurisdiction to Review the Judgment.

The order of the Circuit Court of Appeals affirming the judgment of the trial court was entered June 18, 1948 (Tr. 608). A Petition for rehearing was timely filed and denied on August 4, 1948 (Tr. 629).

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936; Title 28 U.S.C.A. 347); also because the Circuit Court of Appeals has decided important questions of Federal law, which have not been, but should be settled by this Court, (Supreme Court Rule 38, Par. (5) (b)), namely, as to whether or not it is necessary for the

Government, in a "net worth" case to prove a source of income exceeding the miscellaneous income reported on the taxpayer's return for which the tax was paid, or is proof of a mere 10% of the amount reported as miscellaneous income sufficient proof to establish a source of income; also because the Circuit Court of Appeals decided said question in a way probably in conflict with an applicable decision of this Court, (Supreme Court Rule 38 (5) (b)), namely, the decision in the case of *United States* v. *Johnson*, 319 U. S. 503, where this Honorable Court says on Page 517 when referring to the magnitude of Johnson's gambling operations, "But that these gambling transactions were on an enormous scale was overwhelmingly established," the fair and reasonable inference being that the transactions were far in excess of the amount of income reported on Johnson's tax return; also because the Circuit Court of Appeals sustained the trial court in refusing to dismiss the indictment on motion where the Bill of Particulars set up a fatal variance with the indictment, giving rise to a novel federal question of pleading under the new Criminal Rules; also because the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. (Supreme Court Rule 38 Par. (b)) namely:

(a) In sustaining a conviction based on the uncorroborated statement of a Revenue Agent relating to an alleged oral admission of the Petitioner, contrary to every written decision in the United States and in violation of the rule requiring corroboration of any admission by the defendant, as approved by this Honorable Court in *Warszower* v. *United States*, 312 U. S. 342.

(b) In the instant case the Circuit Court of Appeals has misapplied the decision of this Court concerning books and records as announced in *Spies* v. *United States,* 317 U. S. 492, and circumvented the decision of this Court pertaining to Taxable income as announced in *Commissioner* v. *Wilcox,* 327 U. S. 404.

(c) The Petitioner has been deprived of his Constitutional rights as guaranteed by the Fifth and Sixth Amendments. The Petitioner is entitled to a fair and impartial trial and to the protection of the Court against prejudicial or inflammatory statements of the prosecution, as set forth in *Berger* v. *United States,* 295 U. S. 78. The Petitioner was deprived of his liberty without due process of law because of the insufficiency of the evidence and the failure of the Government to prove wilfull evasion of tax as a felony under Section 145 (b) as set forth in the indictment, as held by this Honorable Court in *Spies* v. *United States,* 317 U. S. 492.

III.

The Questions Presented.

1. Did the Court err in sustaining a conviction on the uncorroborated statement of a Revenue Agent concerning the alleged oral extrajudicial admission of the Petitioner?

2. Is it necessary for the Government to prove a source of income in a "net worth" case in excess of the miscellaneous income on which he paid the tax?

3. Can a Revenue Agent compute a taxpayer's "net worth" on a two-year basis and arbitrarily decide the first year tax return is correct and the second year tax return wrong, because the taxpayer spent more money in the second year than he reported as income, and does the circumstantial evidence rule apply?

4. If the defendant is the President of a corporation and owns one-half of the common stock, do moneys received by him from the sale of corporate merchandise belong to him, so as to constitute taxable income, or is it corporate property?

5. Should the indictment be dismissed because of a fatal variance between the indictment and the Bill of Particulars?

6. If the defendant has insufficient or incorrect books and records, is it a felony or a misdemeanor under the income tax laws?

7. Did the Court err in denying the Petitioner's motion to instruct the prosecution to refrain from introducing prejudicial and inflammatory evidence, and did the Court err in denying the Petitioner's motion to strike out all such evidence and testimony?

8. Was the Petitioner deprived of a fair and impartial trial and of due process of law by the prejudicial statements and the actions of the Attorneys for the Government?

9. Did the Court err in denying the Petitioner's motion for acquittal at the close of all of the evidence for the prosecution?

10. Did the Court err in denying the Petitioner's motion for acquittal at the close of all of the evidence?

IV.

Reasons Relied On for the Allowance of the Writ.

The following are the important reasons why this Court should grant a writ of certiorari.

1. The Circuit Court of Appeals rendered a decision in the instant case which is of the utmost importance to every

taxpayer in the United States. The conviction is based upon an uncorroborated statement of a Revenue Agent as to the Petitioner's alleged extrajudicial admissions, which are used to furnish a starting point for establishing his "net worth." If this opinion is permitted to stand, it will be the most dangerous decision ever rendered in American Jurisprudence, for the reason that from now on every taxpayer is at the mercy of any Revenue Agent, for all the Revenue Agent has to do is testify the taxpayer told him "thus and so" without any corroboration whatsoever. The taxpayer will be helpless on the authority of this decision.

The rule has always been otherwise, in every other type of case, and the question has never been presented to a reviewing court before in an income tax matter; the decision is probably in conflict with an applicable decision of this Honorable Court set forth in *Warszower* v. *United States*, 312 U. S. 342 where the rule requiring corroboration of any extrajudicial admission by a defendant is approved. All other decisions in the United States follow the same rule and to make an exception in an income tax case is contrary to all legal principles.

2. The Circuit Court of Appeals rendered a decision upon an important question of Federal law, which has not been but which should be decided by this Court, and that is whether or not it is necessary for the Government to prove a source of income in a "net worth" case in excess of the miscellaneous income reported on the taxpayer's income tax return. In the instant case, the taxpayer reported miscellaneous income of $71,000. and paid his tax thereon, yet the Government proved only $7,000. income on the trial and seeks to hold it as a possible source of income to be applied against expenditures of over $300,000. for

the same year. Unless the Government is required to show a possible source of income in excess of the amount reported by the taxpayer, every taxpayer is subject to prosecution for spending his money in a given year. All the Government would have to show is an insignificant amount of possible income, regardless of the amount reported by the taxpayer. We have been unable to find any decision on this question, but rely entirely upon common sense and established criminal law principles.

3. The Circuit Court of Appeals has entirely overlooked a very important question of Federal law, which has not, but should be decided by this Court, and that is whether or not a Revenue Agent can compute a taxpayer's "net worth" as of a given date and project said "net worth" over a two-year period, arbitrarily deciding the first year tax return to be true and correct and the second year tax return to be wrong, because the taxpayer spent more money in the second year than he reported as income, and does the circumstantial evidence rule apply. By what authority does the Revenue Agent make this decision and use it to convict the taxpayer; although this point was assigned as error in the Circuit Court of Appeals and earnestly argued in the briefs and oral argument as part of the motion for acquittal at the close of all the evidence, the decision of the Circuit Court of Appeals is silent on the point and to the best of our knowledge this point has never been decided in any Court.

4. The Circuit Court of Appeals rendered a decision upon an important question of Federal law which is probably in conflict with an applicable decision of this Honorable Court as set forth in *Commissioner* v. *Wilcox,* 327 U. S. 404, when by affirming the decision of the lower court, the Circuit Court of Appeals held that although the tax-

payer is the President of the corporation and owns only one-half of the common stock, any moneys received by him from the sale of corporate merchandise belongs to him and constitutes taxable income to him and is not corporate property. This decision is also probably in conflict with the holding of this Honorable Court in *Gould* v. *Gould*, 445 U. S. 151 on page 153 relating to the interpretation of statutes being construed most strongly against the Government and in favor of the citizen.

5. The Circuit Court of Appeals rendered a decision upon an important question of Federal law which has not been but which should be decided by this Honorable Court, and that is whether or not a motion to dismiss should be allowed where a Bill of Particulars admits that the Government has no knowledge of the essential elements required to establish the crime alleged in the indictment, thereby creating a fatal variance with the indictment and in effect nullifying and voiding the indictment. The legal principle involved is whether or not the Government is bound by the admission made in the Bill of Particulars and the indictment should be declared null and void.

It is submitted that a defendant should not be required to stand trial when the Government admits it has no knowledge of the essential elements of the crime with which the defendant is charged. This is a very important question of pleading in criminal law and has been decided by some of the District Courts and State Courts in favor of the defendant, but has never been passed upon by a Federal Court of Review.

6. The other questions presented are assigned as error, but do not present novel or unique questions and will be argued in due course.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, Number 9369, *Samuel Chapman, Defendant-Appellant* v. *United States of America, Plaintiff-Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

MICHAEL F. MULCAHY,
HENRY W. DIERINGER,
Attorneys for Petitioner.

DATED August 27, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No.

SAMUEL CHAPMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals (June 18, 1948) is not yet reported. It is printed in full in the Transcript of Record (at pages 600 to 608, inclusive). The petition for rehearing (timely filed) was denied August 4, 1948 (Tr. 629).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936; Title 28 U. S. C. A. 347). The Circuit Court of Appeals for the Seventh Circuit has in this case "decided important questions of Federal law,

which have not been but should be settled by this Court" (Supreme Court Rule 38 (5) (b)), furthermore the Circuit Court of Appeals decided Federal questions in this case in a way probably in conflict with applicable decisions of this Court and are so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. (Supreme Court Rule 38, Par. (b).) Namely, *Warszower* v. *United States,* 312 U. S. 342; *Spies* v. *United States,* 317 U. S. 492; *Commissioner* v. *Wilcox,* 327 U. S. 404; *Gould* v. *Gould,* 445 U. S. 151.

In addition the Petitioner has been deprived of his Contitutional rights as guaranteed by the Fifth and Sixth Amendments. The Petitioner is entitled to a fair and impartial trial and to the protection of the court against prejudicial and inflammatory statements of the prosecution. *Berger* v. *U. S.,* 295 U. S. 78.

The Petitioner was deprived of his liberty without due process of law because of the insufficiency of the evidence when the Government sought to prove willful evasion of tax as a felony under Section 145 (b) as charged in the indictment. *Spies* v. *United States,* 317 U. S. 492.

Statement of the Case.

The Petitioner, Samuel Chapman, was prosecuted in the United States District Court for the Northern District of Illinois, Eastern Division, under an indictment consisting of one count. He was charged with willfully attempting to defeat and evade a large part of the income tax due and owing by him to the United States Government for the calendar year 1943 (Tr. 2-3). He was tried before a Jury and found guilty. The Court sentenced him to a year and

a day in the Penitentiary and fined him $10,000. On appeal, the United States Circuit Court of Appeals for the Seventh Circuit affirmed the conviction (Tr. 600).

Several errors are alleged and were urged on appeal to the Circuit Court of Appeals, all of which were resolved against the Petitioner. Samuel Chapman was the President and principal stockholder of the Empire Packing Company, an Illinois Corporation, engaged in the processing and sale of meat. The indictment charged that he had an income for the calendar year 1943 of over $300,000.00, of which $282,115.82 was alleged to be "other income". Petitioner filed his tax return for 1943 showing income of over $90,000.00 of which $71,000.00 was listed as miscellaneous income, and paid a tax thereon of $60,355.36. The case was tried as a "net worth case", the Government seeking to prove the Petitioner expended more money for the year 1943 than he had available. The Petitioner contended he had the money to spend, particularly cash in his safety deposit boxes.

The Petitioner assigned error arising out of rulings of the Court preliminary to trial, particularly in allowing an amendment to the Bill of Particulars and a Supplemental Bill of Particulars to be filed and then overruling the Defendant's motion to dismiss the indictment. Error is also assigned because the Court overruled a motion before trial to instruct the prosecution to refrain from introducing or attempting to introduce certain evidence or testimony prejudicial to the Petitioner. The Petitioner also complains and assigns as error, the immateriality and insufficiency of the evidence to support the verdict, particularly the uncorroborated statement of the Revenue Agent alleging an oral extrajudicial admission of the Petitioner to said Revenue Agent, concerning his cash on hand at

the time the Revenue Agent was attempting to find a starting point with which to establish a "net worth case". The Petitioner claims no additional taxable income was proven and that it is incumbent upon the Government to prove a source of income greater than the amount of miscellaneous income reported by him and for which he paid a tax, and the Government having shown only 10% of his reported miscellaneous income, failed to establish a prima facie case. The Petitioner also assigns as error, the improper argument of the prosecution in the opening statement and closing arguments and contends that it was designed to inflame the jury and the verdict was the result of passion and prejudice.

Petitioner further claims the Court erred in not directing an acquittal or granting a new trial. The case was tried for two weeks and because of the number of exhibits and the bulk of books and records, the exhibits are not printed in the transcript of record, but were sent up in their physical form by order of Court. There are over 400 exhibits in evidence, yet the jury was out only about 45 minutes, conclusively proving they could not have considered the evidence.

Specification of Errors.

Errors intended to be urged are those specified as questions 1 to 10, inclusive, under division III of the Petition, at pages 8 and 9, the Circuit Court of Appeals having ruled adversely or having failed to rule on such questions.

Summary of Argument.

1. In a "net worth case", the starting point must be based upon a solid foundation, and a Revenue Agent's

statement of the defendant's oral extrajudicial admission or confession, when uncorroborated, is not sufficient to convict.

2. The Government must show a source of income in excess of the amount reported on the Defendant's income tax return before a conviction can be sustained.

3. A Revenue Agent cannot compute a taxpayer's "net worth" on a two-year basis and arbitrarily decide the first year's tax return is correct and the second year's tax return wrong because the taxpayer spent more money in the second year than he reported as income, and the circumstantial evidence rule applies.

4. If the Defendant, as the President of a corporation and owner of one-half of its common stock, sold corporate merchandise and received money, such money belongs to the corporation and is not taxable income to the Defendant.

5. The motion to dismiss the indictment should have been allowed because of the fatal variance between the indictment and the Bill of Particulars, the Bill of Particulars admitting on its face the Government had no knowledge of the essential elements required to constitute the crime alleged in the indictment.

6. Where the Defendant has insufficient or incorrect books and records under the income tax laws, it is a misdemeanor and not a felony and the defendant should have been acquitted.

7. Defendant's motion to instruct the prosecution to refrain from introducing prejudicial and inflammatory evidence, consistently and repeatedly referred to by the prosecution as "black market" should have been allowed, and the Court erred in overruling the motion and in denying

defendant's motion to strike out all such evidence and testimony.

8. The defendant was deprived of a fair and impartial trial and of due process of law, by the prejudicial statements and actions of the Attorneys for the Government designed to arouse the passion and prejudice of the jury.

9. The Court erred in denying the defendant's motion for acquittal at the close of all the evidence for the prosecution, because the prosecution failed to make out a *prima facie* case.

10. The Court erred in denying the defendant's motion for acquittal at the close of all the evidence, not only because the Government failed to make out a *prima facie* case, but because the evidence offered by the defendant created more than a reasonable doubt as to defendant's guilt.

ARGUMENT.

The argument herein is designed to follow the questions presented in the petition and the reasons relied on for the allowance of the writ in the same order as set forth in the Petition.

I.

In a "net worth case", the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral extrajudicial admission or confession, when uncorroborated, is not sufficient to convict.

In order to establish a "net worth case", it is necessary for the prosecution to have a good solid foundation upon which to start computing the net worth of a defendant on any given day. Mr. Lloyd, the Government Agent, took as his starting point, January 1, 1942 and figured the Defendant's net worth as of that day (Tr. 350). He testified that he obtained his information from books and records submitted by the Defendant, and other physical assets that he could see. He further testified that on one occasion his partner, a Revenue Agent, Mr. Henry Levine (not to be confused with Henry Levine, who was employed as a salesman by the Empire Packing Company), asked the defendant if he had any cash in safety deposit boxes on January 1, 1942 and that the defendant said he did not. Mr. Lloyd further testified that at a meeting in his office, at which time Henry Levine, the Revenue Agent, was again present, along with the defendant and his two accountants, Mr. Julius Barnard and Mr. Monroe Mendelson, Mr. Lloyd said the defendant did not want a stenog-

rapher present, and that he presented some work papers to the defendant, and his accountants, setting forth the assets and liabilities of the defendant, and that the defendant said they were substantially correct. Mr. Lloyd was testifying from memory with the assistance of a memorandum, which he says he made at the time of the meeting, but his statement that he submitted work papers of the assets and liabilities of the defendant to the defendant, was flatly denied by both accountants. Henry Levine, the Revenue Agent, although present at the time and available to the Government did not testify. It is a well established principle of law that if a witness is available and is not used, the inference is that his testimony would be unfavorable. In *Clayton* v. *United States,* 152 Fed. 2nd 402, on page 403, the Court said:

> "Appellant concedes the rule that if a party has it peculiarly within his power to produce a witness whose testimony would elucidate the matter under investigation, the fact that he does not do so gives rise to a presumption that the testimony, if produced, would be unfavorable."

Again in *United States* v. *Walker,* 152 Fed. 2nd 612, on page 613, the Court said:

> "It is a general principle that failure to produce evidence or present witnesses available to a party gives rise to the inference that such evidence or testimony would be unfavorable to that party."

The Supreme Court of the United States approved this principle in *Caminetti* v. *United States,* 242 U. S. 470, at page 495.

We cannot dwell too heavily upon this proposition, because it is the heart of the whole "net worth case". Mr. Lloyd arbitrarily ruled out any money that the defendant may have had in the safety deposit boxes on January 1,

1942 or on January 1, 1943, and gave him no credit whatsoever for cash in his safety deposit box, in his computation. We earnestly submit that the mere statement of the Revenue Agent, uncorroborated, relating any extrajudicial admission or confession of the defendant, is not sufficient to bring about a conviction. Such has long been the law and many cases have been reversed on that proposition. The instant case is the only one affirming such a conviction.

In *Naftzger* v. *United States,* 200 Fed. Rep. 494 at page 498, the rule is laid down as follows:

> "It is not contended that the defendant had at any time made a confession of guilt, but if he had made a confession out of court, such confession would not supply the requisite proof that the stamps had been stolen. A conviction upon extrajudicial confession, or acts, or declarations of a prisoner, will not be sustained, without corroborative proof, that the property was in fact stolen."

In *Gulotta* v. *United States,* 113 F. 2nd 683 on Page 686, the Court said:

> "The rule that to warrant conviction of a crime both confessions and admissions must be corroborated by some independent evidence is illustrated in cases very similar to the present."

In *Pines* v. *United States,* 123 F. 2nd at 825, the rule is discussed again on page 829, here the Court says:

> "There was here, however, no evidence save his own admission that he had possession of those securities."

And the case was reversed because there was no corroboration.

In *Tabor* v. *United States,* 152 Fed. 2nd 254, on page 257, the Court said:

> "The main question to be considered on this appeal

is whether there was sufficient independent evidence of the corpus delicti other than through the alleged extrajudicial confession and admissions of the defendant. The rule on this point varies somewhat but the great weight of authority is to the effect that there must be some independent evidence of the corpus delicti. Here in the case against the defendant, Tabor, alone, the corpus delicti is the falsity of the statements made by him before that board, these in no way constitute independent evidence aside from the confession that these statements were false."

The case was reversed for lack of corroboration.

In *Yost* v. *United States,* 157 F. 2nd 147, the Court says:

"At his trial, the Government relied wholly upon a statement made by appellant to Federal Bureau of Investigation Agents when interrogated by them as to the circumstances of his rejection, and on this appeal the questions presented relate entirely to the admissibility of the statement in evidence and whether, if properly admitted, the statement was itself sufficient to warrant admission of the question of guilt to the jury. We have examined the record carefully and have reached the conclusion that the statement was properly admitted. But we are even more strongly of opinion that when it is considered with the other evidence in the case, there is a total lack of any substantiation of the charge of conspiracy to commit an offense against the United States. In this view appellant's motion in the court below for an instructed verdict of not guilty should have been granted."

And the case was reversed for lack of corroboration.

There are many other cases reversed for the same reason, amongst them: *Goff* v. *United States,* 357 Fed. Rep. 294; *Martin* v. *United States,* 264 Fed. Rep. 950; *Tingle* v. *United States,* 38 F. 2nd 573; *Forte* v. *United States,* 94 Fed. 2nd 236.

The United States Supreme Court referred to this rule in *Warszower* v. *United States,* 312 U. S. 342, wherein the Court distinguished this rule from the rule applicable to statements made before a crime was committed, distinguishing statements made before the fact and statements made after the fact. In the case at bar, of course, the rule applying to statements made after the fact, is governing.

The Circuit Court of Appeals for the Seventh Circuit in its opinion in this case, says the Government established a starting point by the defendant's books and records and that the defendant was merely corroborating this. The Court has overlooked the basic principle that the defendant cannot corroborate himself and that the books and records are only part of the starting point and the cash on hand is a very important item that cannot be disregarded. The court, in its opinion recognized that the defendant had about $225,000. cash in his safety deposit boxes at the beginning of the year in question, for it quotes the testimony of the eye-witness who saw the money (Tr. 604), and yet proceeds to disregard it entirely. The witness, Mr. LeRoy Hirsch, testified before the Grand Jury that he knew the defendant had money in his safety deposit boxes, because he saw it and that testimony stands uncontradicted. If the defendant is given credit for the money he had in the safety deposit boxes, he necessarily had sufficient funds available to make the expenditures he did in 1943, and there can be no presumption that he had unreported income. The evidence showed that the defendant was in business since 1913, owned a great deal of real estate, and had many profitable transactions and that he could have had money available to him (Tr. 454-496). Further proof that the defendant must have had money

is the evidence that he purchased the farm in question in March, 1943, paying over $100,000. in cash, although the Government contends that he received illegal over-ceiling payments in June, July and August of 1943. This point has been repeatedly argued to prove that the man had money in the safety deposit box, as testified to by Mr. Hirsch, and that he could not have received it as the Government claims, however, both the trial court and the Circuit Court of Appeals have completely ignored this proposition.

In its opinion, the Circuit Court of Appeals becomes confused when the defendant's accountant, Kulbarsh, estimated the defendant's available cash to be only $12,156. on cross examination and overlooks the fact that the accountant was answering hypothetical questions, and was protesting that such was not the fact and other factors had to be considered (Tr. 480). The other factors testified to by Mr. Kulbarsh were the capital gains based on documentary evidence found on public records, totalling $51,050. during the period from January 1, 1913 to December 31, 1928 and $7,470. from loans and personal notes for which Mr. Chapman received cash (Tr. 491). The Court overlooked the fact that $386,168. taken from the income tax returns, plus the capital gains of $51,050. and the cash received from notes, totals, $426,706. The cross examination by the District Attorney did not go into this matter and it is important to note that the cash expenditures were replenished by numerous sales of real estate as evidence by the real estate compilations in book form marked Defendant's Exhibits 10, 11 and 12.

The importance of this decision goes far beyond Samuel Chapman, as an individual, and whether or not he shall serve a year and a day in the Penitentiary and pay a

$10,000 fine, for it affects the rights and security of every taxpayer in the United States. If it is now the law that a Revenue Agent can determine a man's net worth on any given day as he sees fit and can arbitrarily hurdle the question of cash in the safety deposit box or in any other place, by simply stating that the Defendant told him he had no money, without any corroboration whatsoever, the taxpayers are going to suffer a great many unfair and unreasonable criminal convictions. We sincerely urge that this decision cannot be allowed to stand for it violates all conception of American Justice.

II.

The Government must show a source of income in excess of the amount reported on the defendant's income tax return before a conviction can be sustained.

The defendant filed his income tax return for the year 1943, showing an income of $90,000. of which $71,000. was reported as miscellaneous income. On the trial of the case, the Government showed about $7,000. being paid to the defendant as overceiling charges for meat sold by the Empire Packing Company, an Illinois Corporation, of which he was President. Apparently, this was intended to establish a possible source of income to establish the allegation of "other income" in the amount of $282,115.82. That is the only income the Government was able to establish against the amount reported and admitted on the defendant's income tax return. Obviously, the $7,000. is less than 10% of the amount reported as miscellaneous income and it is contended that before any conviction can be had or sustained the Government must be required to prove income in excess of the amount of the reported income on the taxpayer's return. The only decision touching on this point is in *United States* v. *Johnson,* 319 U. S. 503, where

this Honorable Court says on page 517 when referring to the magnitude of Johnson's gambling operations:

> "But that these gambling transactions were on an enormous scale was overwhelmingly established,"

and it is a fair and reasonable inference that the transactions were far in excess of the amount of income reported on Johnson's tax return, particularly in light of the decision of the lower Court in the same case, where they say:

> "To say that his interest in the gambling houses was such as to entitle him to an income greater than that reported is to indulge in rank speculation. If Johnson had reported no income for those years, a different situation would have been presented. We have no hesitancy in holding that the verdict cannot be supported upon this theory."

Of course we recognize that this Court reversed the United States Circuit Court of Appeals in the *Johnson* case, but this particular point was not controlling.

In the instant case, it is very important because a man was convicted on mere speculation, and the Circuit Court of Appeals says in its opinion, that the Government made no attempt to establish exact amounts of unreported income on which it charged the evasion of tax and says it was not necessary that it do so, citing the *Johnson* case. We submit to this Court that the *Johnson* case does not so hold, but requires the showing of income greater than that reported.

This Court should pass on this point and clarify it for the benefit of all taxpayers and for the guidance of the bench and bar in the future, for obviously it will be a very difficult situation if the decision of the Circuit Court of Appeals is allowed to stand.

III.

Can a Revenue Agent compute a taxpayer's net worth on a two-year basis and arbitrarily decide the first year's tax return is correct and the second year's tax return wrong, because the taxpayer spent more money in the second year than he reported as income, and does the circumstantial evidence rule apply?

The Government attempted to prove the "net worth" of the defendant by circumstantial evidence alone. The law is well settled that in order to sustain a conviction on circumstantial evidence, the facts and circumstances must be absolutely incompatible with any other reasonable hypothesis than that of the guilt of the defendant. In the case at bar there was a great deal of evidence submitted on behalf of the defendant to prove the reasonableness of his plea of not guilty. The question of accounting in a case of this type is very important. The defendant employed a Certified Public Accountant, Nathan P. Kulbarsh, and upon instructions from Counsel for the defense, the accountant started out to determine if the defendant could have had cash available to him to spend during the year 1943, in the amount that he spent. In order to do the job properly, the accountant started with the year 1913 when the income tax law came into effect, and traced the history of the defendant down through 1943. There are many business transactions, real estate transactions, businesses and the like that had to be examined, and the accountant prepared exhibits and other documentary proof to substantiate every fact and figure that he used in his computations. Mr. Kulbarsh examined every income tax return filed from 1913 and used the figures as he found them. The Government accountant did not bother to go to this extent and merely started with January 1, 1942 and then only took the figures that he

wanted to take and disregarded that which he did not like. For example, he charged dummy mortgages as income and charged loans to the defendant as income, and was forced to revise these figures on the trial.

In its opinion, the Circuit Court of Appeals states that the defendant was attempting to conceal bank accounts by using two bank accounts in the name of an agent, but overlooks the fact that this Agent had a written contract to act as farm manager and the farm transactions were perfectly legitimate. The Court notes the deposits in the two accounts amounted to $91,971. for the year 1943, but overlooks the fact that there was only $1,140. in the account at the end of the year, which is the only figure that could be used in determining net worth, and was so testified to by Mr. Loyd (Tr. 381). The same is true of the defendant's bank account, wherein the Court states that he deposited $85,499. At the end of the year he only had $5,875.45 in the bank account for net worth purposes, also testified to by Mr. Loyd (Tr. 381). These moneys were used during the course of the year, over and over again, for buying and selling livestock and other things on the farm, and cannot be treated as a lump sum. Everybody deposits money and withdraws money in their accounts during the course of the year, but no one would think of just adding up the deposits and claiming that he was worth that amount of money. The withdrawals must also be considered and the fact that the same money is used again and again.

The Court says Loyd questioned the defendant about his bank account and that the defendant denied the account. For the defendant to deny having a bank account in his own name in the City of Chicago, would be so silly it should not be given any credence. We know of no au-

thority conferred upon the Treasury Department to arbitrarily construe a bank account in the name of the defendant or in the name of his duly authorized agent as a concealment. The dummy mortgages of record do not enter into net worth, but are commonly used to cloud titles or to use as collateral. The defendant's real estate man testified as a Government witness that he recommended the use of dummy mortgages (Tr. 180). The Court says in its opinion that $151,909. was expended, of which there was no record whatever. That is not a correct statement, because this money was expended on the farm and is at least partially entered on some of the books and records. The books being incomplete merely shows inefficient and improper bookkeeping, but does not warrant the charge of concealment. The defendant was deprived of certain deductions he was entitled to because the entries were not on the books.

The defendant's accountant was working from the standpoint of cash available for working purposes and the Government accountant was attacking purely from the standpoint of net worth without giving any credit to cash in the safety deposit boxes.

At this point, it should be noted that Mr. Loyd, the Government accountant, started his net worth computations on January 1, 1942, added the 1942 income tax return and amended return, and thereby arrived at the net worth of the defendant on December 31, 1942. Because the defendant spent more money in 1943 than he reported as income, Mr. Loyd assumed that money was received in 1943. It is difficult to understand how an accountant from an accounting standpoint, can cover a two-year span and say that the first half, that is the year 1942, is absolutely correct, and that the second half, 1943, is all wrong.

No expert accountant would be so arbitrary and would ask proof. If the defendant did anything wrong, it is just as logical to say he did it all in 1942 and nothing in 1943, or that part was done in each year, or some other years, in order to acquire money.

We call attention to the fact that Mr. Loyd tried to establish that the defendant did not have any cash in his safety deposit box on January 1, 1942, but made no effort to ascertain whether or not he had any cash in his safety deposit box on January 1, 1943, the beginning of the year in question. We repeat that the evidence conclusively shows without any contradiction that the defendant did have cash at the beginning of the year. We urge that the accounting method of the Government accountant is fatally defective, because he has lumped together the two-year period, while the defendant was being tried only for 1943. Who could say beyond a reasonable doubt when the defendant accumulated his money from such an accounting procedure. We submit that the defendant's accountant's method was the only accurate way to determine the operations of the defendant over a period of years.

With all this testimony and evidence, it is impossible to say that there are not two conflicting hypotheses in this case, and in that event with evidence of a hypothesis going to prove the innocence of the defendant, a conviction cannot be sustained. This proposition is so elementary that we mention only a few of the decisions. In *Cox* v. *United States,* 96 F. 2nd 42, on page 43, the Court says:

> "Evidence that is consistent with two conflicting hypotheses tends to prove neither and will not support a conviction. *Gunning* v. *Cooley,* 281 U. S. 90, 94, 50 S. Ct. 231; *Stevens* v. *White City,* 285 U. S. 195, 204, 52 S. Ct. 347; *Svenson* v. *Mutual Life Insurance Co. of New York,* 87 F. 2nd 441-443; *New York Life*

Insurance Company v. *King*, 93 F. 2nd 347, 353; and proof of circumstances while consistent with guilt are not inconsistent with innocence, will not support conviction. *Spalitto* v. *United States*, 39 F. 2nd 782, 784; *Van Gorder* v. *United States*, 21 F. 2nd 939, 949; *Gravens* v. *United States*, 62 F. 2nd 261, 274; *McClintoch* v. *United States*, 60 F. 2nd 839, 842."

In *Nicola* v. *United States*, 72 F. 2nd 780, the Court reversed a conviction for evading income tax, and said on page 786:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of Appellate Court to reverse a judgment of conviction. Citing, *Union Pacific Coal Co.* v. *United States*, 173 F. 737, 740; *Weiner* v. *United States*, 282 F. 799, 801; *Yusem* v. *United States*, 8 F. 2nd 6; *Ridenow* v. *United States*, 14 F. 2nd 888."

The mere conclusion of the Government's accountant, Mr. Loyd, that the defendant did not have the money to make these expenditures, certainly cannot be considered substantial or sufficient evidence upon which to sustain a conviction, and the verdict and judgment should be reversed as a matter of law.

IV.

If the defendant is the President of a corporation and owns one-half of the common stock, do moneys received by him from the sale of corporate merchandise belong to him so as to constitute taxable income, or is it corporate property.

The burden is upon the Government to establish taxable income to the defendant under the indictment and where

the proof offered by the Government establishes money allegedly taken by the defendant, it belongs to the corporation employing him, or to the person making the illegal purchase and such money is not taxable income to the defendant.

After the Government rested its case in chief and the defendant moved for a directed verdict of acquittal, the defendant argued a very important question in this case, and that is, if the Government's contention was correct and the defendant had received money as side payments for the sale of meat belonging to the Empire Packing Company, a corporation, could such moneys be construed as taxable income to him? It becomes immediately apparrent that the merchandise sold belonged to the corporation, a separate, legal entity, of which the defendant was merely an employee. The corporation received the money set forth on the invoice and any additional or side payments made to salesmen, who in turn were supposed to have given it to the defendant, either belonged to the corporation, whose merchandise was sold, or to the purchaser who paid the over-ceiling price. In no event could it belong to the defendant in this case, for he had no right, title or interest of any kind, and could be required to turn it over to the corporation or return it to the persons who made the illegal payment. That question was squarely passed upon by this Honorable Court in *Commissioner* v. *Wilcox,* 327 U. S. 404, when the Court reversed a conviction on the ground that the defendant did not have the necessary claim of right to the money and it did not constitute taxable income to the defendant. The Court discussed a taxable gain as set forth under Section 22 (a) of the Internal Revenue Code, and arrived at the following rules on page 408:

"For present purposes, however, it is enough to

note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Sec. 22(a). * * * the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Sec. 22 (a).

"We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another. Moral turpitude is not a touchstone of taxibility. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of Sec. 22(a)."

Under the foregoing rule the money allegedly taken by the defendant did not belong to him and could not be taxable income. The Circuit Court of Appeals in its opinion, discusses the defendant's position relative to the *Wilcox* case (Tr. 607). The Court distinguishes the case at bar from the *Wilcox* case on the ground that any money collected by the appellant was in effect a premium for such sales by the corporation. The Court does not decide whether or not the corporation was liable for the overpayments; however, the Court says that if the defendant had collected as agent for the corporation, it would not necessarily follow that there would be no liability on his part, citing the *Currier Lumber* case, a District Court opinion (70 F. S. 219). We pointed out in our petition for rehearing that the *Currier Lumber* case held that Currier

was the sole owner of all the stock and therefore was the corporation. In the instant case, the defendant was not the sole owner of this corporation, but owned only 50% of the common stock and the other stockholder had no knowledge of any illegal operations by the defendant, if such there were. We further pointed out there could be no constructive dividends unless paid equally to all stockholders, which of course was not done. The *Currier Lumber* case is not in any manner similar to the case at bar, whereas the *Wilcox* case, a United States Supreme Court decision, is directly in point, and we submit the Circuit Court of Appeals erred in sustaining the lower court on this point.

We submit that the Circuit Court of Appeals decided a very important question of Federal law in conflict with a decision of this Honorable Court in the *Wilcox* case and probably in conflict with the holding of this Honorable Court in *Gould* v. *Gould,* 445 U. S. 151, where on page 153 the Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government, and in favor of the citizen."

Of course this being a criminal case every doubt must be resolved in favor of the defendant.

We again urge the importance of the Federal question herein involved to every taxpayer and submit that the decision rendered by the Circuit Court of Appeals for the Seventh Circuit should not be permitted to stand.

V.

Should the indictment be dismissed because of a fatal variance between the indictment and the Bill of Particulars?

The defendant was indicted on September 25, 1946 for wilfully, knowingly, unlawfully and feloniously attempting to evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1943. The indictment set forth a schedule of gross income and deductions identical to the return filed by the defendant for the year 1943, with the exception of one item called "other income" in the amount of $282,115.82. (Tr. 2-3).

On October 11, 1946, the defendant filed a written motion for a Bill of Particulars asking that the Government be required to state by whom "other income" was paid, and in what manner it was claimed payment was made, and in support of said motion, the defendant filed his affidavit that he had no knowledge of "other income" not reported on his 1943 income tax return, and that he was unable to advise his Attorneys or prepare for trial without such knowledge (Tr. 9). The Court allowed the motion, and thereupon the Government filed its Bill of Particulars on October 21, 1946. The Bill of Particulars does not set forth the information requested by the defendant or ordered by the Court, but states,

> "the Government states it is prepared to prove that the defendant expended over reported income the amount alleged in the indictment.
>
> That with further reference to the particulars asked, the Government states, that it does not possess the information necessary to specify in detail the amount of each and all individual items of income making up the total and aggregate amount of $282,115.82, or by whom

each specific item making up this aggregate amount was paid to the defendant, or the character, manner of payment and the amount paid.

The Government, therefore, is unable to specify particulars as to the information sought by the defendant" (Tr. 10).

On October 25, 1946, the defendant filed a written motion to dismiss the indictment on the ground that the Bill of Particulars does not set forth any income as alleged in the indictment, that the indictment alleging a crime has been nullified and cancelled by the Government's admission set forth in its Bill of Particulars, that it does not possess the necessary information concerning income alleged, and that on the present state of the record the defendant was not charged with a crime for which he should be required to stand trial.

The Court ordered briefs filed, and the defendant filed his brief on November 8, 1946. On November 14, 1946, the Government moved for an extension of time to file its brief and the same was extended to and including November 26, 1946, and the Government thereupon filed its brief.

On December 11, 1946 the Government moved for leave to file a Supplemental Bill of Particulars and an amendment to the Bill of Particulars, the Supplemental Bill stating,

"The the source of 'other income', as alleged in the indictment, was the illegal sale of meat and meat products at over-ceiling prices to various persons by and on behalf of the said defendant.

That the details as to the source of said 'other income' are matters that lie peculiarly within the knowledge of the said defendant" (Tr. 20).

The amendment to the Bill of Particulars sets forth,

"And by leave of this Court, first had and obtained,

amends its Bill of Particulars heretofore filed herein as follows: Paragraph 2 of the stating part of the bill of particulars reading as follows:

"That the defendant expended over reported income in the amount alleged in the indictment," be amended to read as follows: "That the defendant expended during the calendar year 1943 an amount in excess of the total of his available declared resources" (Tr. 19).

The defendant objected to the filing of the Supplemental Bill and amendment to the Bill of Particulars on the ground that the Court had under consideration the motion to dismiss, that said motion should be disposed of first and further the Supplemental Bill of Particulars was merely a prejudicial statement of the District Attorney and did not set forth the facts as ordered by the Court, and both the amendment and the Supplemental Bill of Particulars contradicted the original Bill of Particulars. The Court over-ruled the objection and allowed the filing of the Supplemental Bill and the amendment to the Bill of Particulars (Tr. 15-18). On December 20, 1946 the motion to dismiss was over-ruled (Tr. 21).

On December 27, 1946, the defendant filed a written motion for a more specific Bill of Particulars, setting forth the fact that the Supplemental Bill of Particulars and the amendment to the Bill of Particulars were contrary to the first Bill of Particulars, and that the defendant knew no more than he did when he first moved for a Bill of Particulars. The defendant asked that the Government be required to state who made the alleged sales of meat on behalf of the defendant and when and where and to whom the defendant declared his available resources. This motion was over-ruled (Tr. 24-25).

It has long been an elementary principle of pleading

that admissions made in pleadings are binding. In a criminal case, the presumption of innocence prevails throughout from the time the indictment is returned until the verdict is entered. When the Government admitted in its Bill of Particulars that it had no knowledge of income or the source of the same and was only prepared to prove that the defendant spent more money in the year 1943 than his reported income, the state of the record showed upon its face that the Government had no knowledge of the defendant committing a crime. Under the circumstances the defendant should not have been indicted and certainly should not have been required to stand trial.

The motion was brought under Rule 12 of the current rules of Criminal Procedure in the District Court of the United States, effective March 26, 1946, under Rule 12, Paragraph (a) demurrers and motions to quash are abolished and in lieu thereof a motion to dismiss is used. Paragraph (b) of Rule 12, says,

> "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

Sub-paragraph 2 of Sub-paragraph (b) of said rule provides,

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to

> charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

Inasmuch as these were new rules of criminal procedure, we diligently searched the history and reasons behind Rule 12. The second preliminary draft of the Rules prepared by the Advisory Committee appointed by the Supreme Court of the United States and published February, 1944, says on page 46:

> "The rule is directed to simplification of the procedure by which defenses and objections are raised. The rule abolishes the four procedural forms from which confusion and delay have arisen, and it then provides in their place a simple motion to dismiss or to grant other appropriate relief."

The notes to the Rules of Criminal Procedure prepared by the Advisory Committee in March of 1945, on page 12, in discussing Paragraph (b), Sub-paragraph (1) and (2) of Rule 12 of the Federal Rules of Criminal Procedure indicate that it was the intention of the Committee to follow the Civil Rules as closely as possible. The important part of Rule 12 of the Civil Rules of Procedure as far as this motion is concerned, is the last line under Subparagraph (e):

> "A Bill of Particulars becomes a part of the pleading which it supplements."

Rule 12 of the Criminal Rules is undoubtedly the outgrowth of Rule 12 of the Civil Rules and of decisions dating as far back as 1902 when the Court in *U. S.* v. *Adams Express Co.,* 119 Fed. Rep. 240, said on Page 242:

> "In this case it was apparent from the general terms of the indictment * * * and from the crime charged, although the indictment was sufficient in law, that a Bill of Particulars ought to be filed and the demurrer going to the indictment and the Bill of

> Particulars * * * ; if the facts so recited do not constitute a crime, there is no good purpose served in impaneling a jury and calling many witnesses from a distance, and then being compelled to direct a verdict for the defendant. Not because the law exacts it, but for the reasons stated, and none other I will consider the case as if the indictment contained a recital of all the facts set forth in the Bill of Particulars."

The Court dismissed the indictment.

In the same manner the Court in *U. S.* v. *Clawson,* 13 Fed. Sup. 178, dismissed the indictment, because the Bill of Particulars differed materially from the indictment, the Court holding that a fatal variance was created because the Bill of Particulars showed that no crime was charged, and the Court said on Page 179:

> "After the indictment was returned the defendant moved for a Bill of Particulars setting forth in greater particularity the manner in which it is claimed in the indictment the over-statement of the amount due upon the mortgages had been determined. This motion was sustained, and in due time a Bill of Particulars was filed by the Government setting forth with greater particularity the details of the charges set out in the indictment. The defendant then interposed his demurrer and motion to quash the indictment upon various grounds. * * * No challenge on behalf of the Government seems to be made over the fact that the demurrer and motion are directed to the indictment as amplified by the Bill of Particulars, so that this point need not be further considered, especially inasmuch as such procedure has been recognized as proper by some Courts. *U. S.* v. *Flores,* 3 F. Sup. 134; *Singer* v. *U. S.,* 58 Fed. 2nd 74. One of the points raised is that, while the indictment alleges that the defendant in his capacity as a trustee for a building and loan association made the false statements in question, yet the Bill of Particulars shows that the defendant and

one Charles Andra were Co-trustees holding the mortgages as such at the time the defendant made the alleged false statements to the H.O.L.C. in connection with the loans. It is agreed that this is a fatal variance * * *. Cases are cited in support of this contention. The logic of these cases is to the effect that in an indictment upon which a person is prosecuted for a criminal offense the indictment must be specific in regard to all the essential allegations necessary to constitute the crime, and that if there is a substantial variance in this respect, it is fatal. Some of the cases which illustrate the principles are: *Naftzger* v. *U. S.*, 200 F. 494; *Fontana* v. *U. S.*, 262 F. 283."

In the various code states the Courts have held that a Bill of Particulars furnished upon request of the defendant in a criminal case becomes a matter of record and is to be read together with the indictment or information. *State* v. *Roy,* 60 P. 2d 616 (New Mexico); *Commonwealth* v. *Peks,* 121 N. E. 420 (Mass.); *Commonwealth* v. *Howard,* 205 Mass. 128 (Mass.); *People* v. *Bogdanoff,* 254 N. Y. 16. It will be noted that the old rule to the effect that the Bill of Particulars does not become a part of the record has been discarded. This is just good logic for it seems wrong to ask the Court to close its eyes to a Bill of Particulars that is repugnant to the indictment and to force a defendant to stand trial when the record before the Court shows there is no crime charged.

In 27 Am. Jur. on Page 673 it is said:

"At common law and in the absence of a statute, a Bill of Particulars furnished the accused under order of Court is not a part of the record. Under some statutes, however, such a bill becomes a part of the record and is to be read with the indictment or information, and under such statutes it becomes a part of the formal accusation for the purpose and to the extent of supplying extraneous evidence as to a matter

in which the indictment or information, otherwise sufficient, is deficient or erroneous, so as to uphold the accusation against the objection that because of the particular omission or error it is fatally insufficient."

It is our contention that it was the object of Rule 12 of Criminal Procedure to make the Bill of Particulars a part of the record so that the Court may be fully advised and be in a position to rule on the record as it stands so that justice may be served.

The defendant complains that the Court erred in permitting the Government to file a Supplemental Bill of Particulars and an amendment to the Bill of Particulars that so materially changed the statement of the Bill of Particulars that it amounted to a direct contradiction to what was formerly said in the Bill of Particulars. We recognize the fact that the Court had discretion in granting a Bill of Particulars in the first instance and that the Court porbably has the same discretion in permitting the further filing of pleadings, however, where a motion to dismiss is pending we feel that it is an abuse of discretion to permit the Government to do an about face in its pleadings in an effort to prevent the motion being allowed. That is exactly what the Government did in this case, for it did not file its supplemental pleadings until after the briefs were filed, and over a month had elapsed since the motion to dismiss had been made. In examining the Supplemental Bill of Particulars, it becomes immediately obvious that it does not state any facts, but is merely a prejudicial, poisonous statement of the District Attorney that does not rise to the dignity of a conclusion of the pleader, because there are no facts to support such a conclusion. In the same manner the amendment to the Bill of Particulars lends nothing to the pleadings by merely stating that the defendant spent more than his available declared re-

sources. This, too, is not even a conclusion of the pleader, because no facts are stated upon which to base such a conclusion.

The importance of these pleadings were borne out later in the trial, particularly where the so-called "declared available resources" turned out to be an oral statement by a Revenue Agent that the defendant, accompanied by his two accountants, was supposed to have looked at a worksheet the Revenue Agent had prepared, setting forth the assets and liabilities of the defendant and the defendant allegedly stated it was substantially correct. That statement of the Revenue Agent was uncorroborated and flatly denied by the two accountants. That phase of the case has been argued hereinbefore and it shows the importance of having a further Bill of Particulars, as requested by the defendant, setting forth when or where or to whom the defendant "declared his available resources." The importance of a Bill of Particulars regarding "other income" was fully considered by the Court in *Singer* v. *U. S.*, 58 Fed. 2nd 74; *U. S.* v. *Gorman,* 62 Fed. Sup. 347. In the *Singer* case the Court said on page 75:

> "A Bill of Particulars would have enabled the defendant on the one hand to prepare his defense or on the other to attack the indictment. The refusal to furnish a Bill of Particulars left him in a dilemma and was prejudicial."

It is to be noted that at no time did the Government, in the instant case, ever furnish the defendant with the information as to "other income" as originally ordered by the Court.

We submit that where a Bill of Particulars differs materially from the indictment and admits that the Government does not possess information as to the amount of

income, or the character, or manner of payment, or by whom paid, and merely states that the Defendant spent more money than his income for a given year, said Bill of Particulars creates a fatal variance and the indictment should be dismissed. The Circuit Court of Appeals, in its opinion, completely overlooks the reasons for the motion to dismiss. We earnestly contend that a very important question of Federal law is involved in this point because it deals with pleadings in a criminal case, and this Court should determine whether or not the defendant should be required to stand trial when a Bill of Particulars filed by the Government, shows on its face that no crime has been committed.

VI.

If the defendant has insufficient or incorrect books and records, is it a felony or a misdemeanor under the income tax laws?

The defendant was indicted under Section 145(b) of the Revenue Code, for a willful attempt to evade the payment of income tax. There was not an iota of proof in the whole trial that the defendant committed any act that could be construed as an attempt to evade the payment of income tax. The proof showed that he had a bookkeeper keeping books and records of his farm operations; that he dealt with reputable people, who kept records of what he paid and what he owed; that he employed a lawyer to handle his legal affairs; and that he had tax consultants making out his income tax returns. The tax consultants, Mr. Julius Barnard and Mr. Monroe Mendelson, both testified as Government witnesses, and on cross examination admitted that they had made mistakes in the filing of the farm return as a separate return on

a fiscal year basis. That the mistake had cost the taxpayer considerable in taxes and that he had over-paid his tax for the year 1943. The defendant was on trial for a felony, and the United States Supreme Court in *Spies* v. *United States,* 317 U. S. 492, distinguished between Sec. 145(a) of the Internal Revenue Code which constitutes a misdemeanor and Sec. 145 (b), which constitutes a felony. In discussing the two sections, the Court says on page 496:

> "But the law is complicated, accounting treatment of various items raised problems of great complexity, and innocent errors are numerous, as appears from the number who make over-payments. It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care."

On page 497 it said:

> "Willful failure to pay the tax when due is punishable as a misdemeanor. The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax (Sec. 145(b)). The question here is whether there is a distinction between the acts necessary to make out the felony and those which may make out the misdemeanor."

On page 499 it is said:

> "Although the attempt succeeded in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to

evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony. * * * By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

On page 500 the Court says:

"But we think a defendant is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade the tax from some proof in the case other than that necessary to afford such an inference, the defendant should be acquitted."

The Court reversed the conviction.

In the case at bar no affirmative acts of any kind are shown. Neither did the defendant keep a double set of books or make false invoices or documents, or make alterations, or do anything that would constitute an affirmative act. The fact that some of his transactions were not entered in the books by the bookkeeper, resulted in a distinct loss to the defendant fr m a tax standpoint, for he would have been entitled to make certain deductions which he failed to get. Such omissions can at best be construed as a misdemeanor although we fail to see how the defendant can be charged with that, for after all, he hired people to do this work.

The Government should be required to prove willful evasion of tax as a felony under Section 145(b) as set forth in the indictment and proof going only to a misdemeanor necessitates a reversal. We submit that the trial

court erred in not allowing the defendant's motion for acquittal and that the Circuit Court of Appeals was in error in sustaining the trial court. The Circuit Court of Appeals' decision is in conflict with the decision of this Honorable Court in the *Spies* case and for that reason the Circuit Court of Appeals should be reversed.

The next two points will be argued together.

VII.

Did the Court err in denying the Petitioner's motion to instruct the prosecution to refrain from introducing prejudicial and inflammatory evidence, and did the Court err in denying the Petitioner's motion to strike out all such evidence and testimony.

VIII.

Was the Petitioner deprived of a fair and impartial trial and of due process of law by the prejudicial statements and the actions of the Attorneys for the Government?

The Fifth and Sixth amendments to the United States Constitution guarantee the defendant a fair and impartial trial, and the Courts of Review have often reversed convictions in criminal cases because the defendant was denied his constitutional right to a fair and impartial trial. In the case at bar, the defendant was repeatedly referred to by the District Attorneys as having engaged in black-market activities, although this was supposed to be a trial for income tax evasion.

When it became apparent to the Attorneys for the defendant, that the attorney for the Government intended to launch a smear campaign against the defendant by attempting to call him a black-marketeer, a motion was

presented to the Court, in writing, asking for the Court's protection against such tactics, and from a legal standpoint, requesting tnat the prosecution be instructed to refrain from offering evidence or testimony that would be prejudicial to the defendant. The theory of this motion was that the prosecution had two lines of approach in proving an income tax case, first, by proving direct tax due, or secondly, by proving a "net worth case". It was apparent from the Supplemental Bill of Particulars and the amendment to the Bill of Particulars, that the prosecution was going to use a partial direct tax method and then swing over to a "net worth case". The defendant had filed miscellaneous income in excess of $70,000 for the year in question, and it is the defendant's contention that the burden is upon the Government to overcome that amount in dollars and cents before any additional tax could be due and owing; therefore, any attempt to prove receipts of money by the defendant from any source whatsoever must be in excess of the amount reported in the return.

The defense took the position that an attempt by the prosecution to show receipts of money for side payments in the sale of meat would greatly prejudice the defendant's rights and if the sum total of such moneys did not amount to $70,000.00, the Government had failed to prove a direct tax case on that basis; and by the same token it would be a matter of presumption or speculation to say that the defendant received more money than that proven on the trial, or reported in his return. This contention was borne out on the trial, when a few small meat peddlers testified they had paid money as side payments to salesmen of the Empire Packing Company, which salesmen in turn said they had turned the money over to the defendant, but the total sum was about $7,000 as against the miscellaneous income reported by the defendant in the

amount of $70,000. Neither could this be shown to be a probable source of income to establish "other income", as alleged in the indictment, in the amount of $282,115.82, for a "net worth case".

At the time the motion was made, before trial, to instruct the prosecution from using prejudicial or inflammatory evidence or testimony, the Court stated, when overruling the motion, that the evidence must not be intended to prejudice the jury, and the defendant was to get a fair and impartial trial; that the Court would consider these things on motion for a new trial in the event that there would be a finding of guilty (Tr. 55). In spite of these statements by the Court, Mr. Welfeld, Assistant District Attorney, in his opening statement to the jury on behalf of the Government said:

> "The evidence will also show, ladies and gentlemen of this jury, that the Defendant, Samuel Chapman, during the year 1943, spent a great deal of time on the premises of the Empire Packing Company; that he himself collected black-market over-ceiling side payments of currency from persons to whom he was selling meat" (Tr. 59).

In the closing argument Mr. Welfeld told the jury:

> "Today you sit as a cross-section of American citizenry in the performance of a function that is vital to our particular government, and that is the American jury system.
>
> "And in that capacity, ladies and gentlemen, the eyes of the Middle West are focused upon you as you sit in judgment of the first black market income tax case tried in this district" (Tr. 506).

Mr. Welfeld also said to the jury:

> "The next phase of the government's case was the black market sales. Why did we put that evidence in?

"I am sure you know by this time, ladies and gentlemen, the purpose of that evidence was to establish a source of income; to show that there were side payments, black market over-ceiling side payments of cash that came into the hands of Samuel Chapman during the year 1943" (Tr. 511).

And again Mr. Welfeld told the jury:

"The income tax return of Sam Chapman reflects that he spent,—that he reported $71,000 as income from miscellaneous sources. You know and I know that they are going to get up here now and say that he was an honest black marketeer because he reported $71,000 of black market monies" (Tr. 514).

Mr. Welfeld again told the jury:

"We spent a lot of time presenting the operations of Sam Chapman as a black marketeer, as a man who made during that time money when his country had a great issue at stake. You know what the meat situation was in 1943. I do not have to stand here and tell you about things like that. You know that there were black market monies made in the meat business. There were very few people in that business who did not make those monies. There is no reason to believe that Sam Chapman was the exception" (Tr. 517).

And finally Mr. Welfeld said:

"the defense in this case is as false and fraudulent as the income tax return that Samuel Chapman filed for the year 1943" (Tr. 518).

After the closing argument by Counsel for the defense, Mr. Miller, Assistant District Attorney, replied for the Government and said:

"They tried to point out the black market payments were not testified to until June and July. I remember distinctly and it is in the record that these payments

started in the spring of 1943. Certainly it was only to get testimony on the beginning or source in this case. Mr. Chapman built some fences around himself. He took a lot of affidavits which were just as much a part of his scheme of extortion as any other item that he took from these men.

The black market money and the affidavits are in the same category. These fellows couldn't get any meat unless they signed it. You are entitled to make that inference from the situation.

Certainly we all know what the situation was in 1943. I for one have not had any personal experience of that yet here but we know what the situation was. Everybody had to pay black market prices.

Where does the black market begin in a situation like this? It begins with a fellow who is in the business that Sam Chapman is in. He wanted beef and he sold beef. He was the first man who processed it after it was killed and there is where your black market prices began. He started it.

He passed it on to those peddlers and they in turn probably passed it on to the butchers who in turn passed it on to you. That is where it started. This was the source of the money that he had during that time" (Tr. 543).

Mr. Miller again told the jury:

"They cannot deny, the evidence of the black market payments and transactions is not disputed. There isn't any doubt but what that was the source of his income.

I have tried not to give you a lot of figures but the amount on the books, as you recall, I think should be mentioned, on the basis of the computation it was $193,000 and that is a lot of money, particularly in a year when the government needed revenue desperately. We were in a perilous situation in those years and we certainly should have had, our government should have had all the support that it was able to get. And we find Sam Chapman during that

time when conditions were bad, gouging and extorting money from his customers and from his neighbors; and that is not bad enough, he turns around when the government desperately needed revenue and cheats his government.. There is the man that sits before you, that has done these things, and I say that the government has established a case without any doubt about it. The evidence stamps the word of guilty on Sam Chapman, and I ask you, ladies and gentlemen, to go out and do your duty and bring in a verdict of guilty" (Tr. 546).

These statements of the District Attorneys are nothing short of vicious, and were made for the sole purpose of inflaming the passion and prejudice of the jury against the defendant. Certainly, the District Attorneys cannot be permitted to repeatedly refer to black market over-ceiling side payments in such a manner as to lead the jury to believe that they are trying the man for such a crime. The very language that "he started the black market," and that it was passed on "to you" (meaning the jurors) through their butchers is distinctly prejudicial and harmful. Telling the jury that the eyes of the middle West were focused upon them, and that they were sitting on the jury of the first black market income tax case tried in the District was for the purpose of impressing the jury with the thought that it was a black market case. The reference to the "perilous situation of the Government," that the defendant was "gouging and extorting money from his customers and neighbors when the Government needed revenue desperately" was highly improper.

Such conduct of the prosecuting attorneys has been denounced by the United States Supreme Court. In *Berger* v. *U. S.*, 295 U. S. 78, 55 S. Ct. 629, on page 443 the Court said:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

In *Volkmore* v. *United States,* 13 F. 2nd 592, a judgment of conviction was reversed solely because of the United States Attorney's improper and abusive characterizations and references to the defendant during his summation as a skunk and weak-faced weasel, and a cheap, scaly, and slimy crook. The Court said:

> "Admitting that these statements were wholly unjustifiable—as indeed must be done—the government contends that, as defendant failed to ask for exceptions, the error is not available. In the first place, there was no adverse ruling on the objections, and in that situation an exception was a matter of dubious propriety. But, even if there had been no objection, it was the duty of the court, on its own motion, to reprove counsel, and to instruct the jury to disregard the remarks. This is not a case of inadvertence of statement, but of intentional abuse."

It is respectfully submitted by the defendant in the case at bar, that the District Attorneys intentionally prejudiced the defendant, by calling him a black marketeer and a gouger and the person who started the black market, and by stating that he was the person who took money from you (meaning the jury). Counsel for the defense was aware of this danger from the filing of the Supplemental Bill of Particulars, and asked the Court's protection to prevent it and relied upon the assurance of the Court that such tactics would be considered on motion for a new trial, if a conviction was had.

There are many other decisions wherein convictions were reversed because of such tactics of the District Attorneys, among which are; *Pierce* v. *United States,* 86 Fed. 2nd 949 and *Kassin* v. *United States,* 87 Fed. 2nd 183.

From the complete record in this case, it is obvious that the defendant was not tried on "an attempt to evade the payment of income tax" as stated in the indictment, that the District Attorneys never intended to make that the main issue, but from the very outset every effort was made to inject evidence and statements into the trial of "black market" and other remarks that would degrade the defendant in the eyes of the jury.

If the Government thought that this man was a black marketeer, there is a criminal Statute under which he could have been indicted and tried and it is elementary that a defendant should be tried only for that which he is indicted and nothing else.

In *Spies* v. *U. S.* 317 U. S. 492, this Honorable Court holds that a defendant should be convicted only of the offence which he committed, and says:

> "The Government argues against this construction, contending that milder punishment of a misdemeanor

> and the benefits of a short statute of limitation should not be extended to violators of the income tax laws such as political grafters, gamblers, racketeers, and gangsters. We doubt that this construction will handicap prosecution for felony of such flagrant violators. Few of them, we think, in their efforts to escape tax, stop with mere omission of the duties put upon them by the statute, but if such there be, they are entitled to be convicted only of the offense which they have committed."

We have consistently and repeatedly argued from the beginning of this case that the Government should not be permitted to convict Samuel Chapman, the defendant herein, of income tax evasion by calling him a black marketeer. If he has committed that crime, let him be tried for it and none other. The Circuit Court of Appeals completely overlooked this point and erred in sustaining the trial court contrary to the decisions of this Honorable Court. We submit that a citizen of the United States should not be subjected to the abuse received by the defendant in this case by the District Attorneys in the manner hereinbefore set forth, because of such unfair and improper tactics, this Court should reverse the Court below.

The next two points will be argued together.

IX.

Did the Court err in denying the Petitioner's motion for acquittal at the close of all the evidence for the prosecution?

X.

Did the Court err in denying the Petitioner's motion for acquittal at the close of all of the evidence?

When the Government rested its case in chief, it had only proved about $7,000. in side payments of money to salesmen of the Empire Packing Company, who said they turned it over to the defendant. Against this, the defendant's income tax return showed miscellaneous income of $70,000. The Government had also shown a net worth increase from the computations of their Accountant, Mr. Loyd, of over $300,000. for the year in question, but it must be borne in mind that this is the same Mr. Loyd who refused to give credit for cash in the safety deposit box of about $225,000., and who computed the defendant's net worth computations as computed by Mr. Loyd. They year was correct, that is 1942, and the second year, 1943, was wrong. Mr. Loyd is the same witness who testified to an uncorroborated extrajudicial admission of the defendant; that he was supposed to have said he had no cash on January 1, 1942. There was not an iota of evidence up to this point in the case as to what the defendant had or did not have in the way of cash on January 1, 1943, the beginning of the year in question.

Under those circumstances the Government was asking the Court and Jury to presume that the defendant received side payments to the extent of the increase shown on the net worth over a two-year period, assuming that the first also asked the Court and Jury to presume that such money

was not only received by the defendant, but that it was the same money spent during the year 1943 and constituted taxable income to him. Mr. Loyd's testimony was a presumption based upon circumstantial evidence from which a second presumption cannot legally be drawn. It is well established that presumptions cannot be based upon presumptions; *Rabiste* v. *United States,* 44 Fed. 2nd 21; *Wagner* v. *United States,* 8 Fed. 2nd 581. Neither are suppositions or suspicions sufficient to support a conviction; *Caringella* v. *United States,* 78 Fed. 2nd 563; *United States* v. *Corlin,* 44 Fed. Sup. 940; *Eng Jung* v. *United States,* 46 Fed. 2nd 66; *Cox* v. *United States,* 96 Fed. 2nd 41; *Mazursky* v. *United States,* 100 Fed. 2nd 958. To ask the Court and Jury to infer that the defendant received more taxable income than he reported in this case is to indulge in pure speculation.

We have already argued the insufficiency of the testimony of Mr. Loyd as to the alleged extrajudicial admission of the defendant, uncorroborated, which was the basis of his computations, and we have also argued the question of whether or not the Government should be required to prove an income greater than the amount shown on the tax return before any conclusion can be drawn and whether or not the *Wilcox* case applied. We submit that the Government failed on all of these points, and did not make out a *prima facie* case.

The Circuit Court of Appeals, in its opinion, seeks to find corroboration of the Government's estimate of the defendant's net worth in the testimony of the defendant's accountant, Kulbarsh. If it is necessary to even consider any of the defense evidence by way of corroboration it becomes immediately apparent that the Government failed to make out a *prima facie* case, and the defendant's motion

for acquittal at the close of all of the evidence of the prosecution should have been allowed. We are again dealing with a question of law very important to the trial of Federal Law income tax evasion cases. We urge that all the criminal rules required to make out a *prima facie* case should be applied to this type of case as well as any other and the Government should be required to make out a *prima facie* case.

At the close of all the evidence, the defendant again moved for an acquittal, which motion was over-ruled. This motion was based not only on the questions argued on the motion for acquittal at the close of the Government's case, but on the propositions that uncontradicted testimony cannot be disregarded by the Court and the Jury, particularly referring to the testimony of Mr. LeRoy Hirsch, that he saw $225,000. in the defendant's safety deposit box in February, 1943 and spoke to the defendant about it. The same witness had testified before the Grand Jury that he saw money in the defendant's safety deposit box and while testifying as a Government witness in its case in chief, mentioned that he had gone to the safety deposit box with the defendant on numerous occasions. (Tr. 188) This Honorable Court said in *Penn. R. R.* v. *Chamberlin,* 288 U. S. 333, on page 341:

> "And the desired inference is precluded for the further reason that respondents' right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

In the face of this uncontradicted evidence that the de-

fendant had money in the safety deposit box, the Government asked the Court and jury to infer from the Government accountant's statement that the defendant had no money in the box. Under the law such an inference cannot be permitted.

The defendant produced the C. P. A., Nathan P. Kulbarsh, who testified that the defendant could have had cash on hand with which to make the expenditures in question.

It was urged that there was more than a reasonable doubt existing, and the Circuit Court of Appeals, in its opinion, seems to admit the same when they say on the last page, "even though appellant disputed that evidence and introduced his own evidence to explain the facts otherwise." Certainly, if the facts are explained otherwise, there is more than a reasonable doubt of the defendant's guilt and there should be no alternative but to direct a verdict of acquittal. We submit the Circuit Court of Appeals is in error in sustaining the judgment of the lower court and should be reversed.

CONCLUSION.

Because of the numerous important federal questions that should be settled by this Honorable Court, raised in this case for the first time in the United States, it is respectfully submitted that this Honorable Court should grant the Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit, as prayed in the petition.

Respectfully submitted,

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MICHAEL F. MULCAHY
HENRY W. DIERINGER,
Attorneys for Petitioner.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 252

SAMUEL CHAPMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 600–608) is reported in 168 F. 2d 997.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1948 (R. 608). Petition for rehearing was denied on August 4, 1948 (R. 629). Petition for a writ of certiorari was filed on August 31, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the indictment and the bill of particulars.

2. Whether the evidence was sufficient to sustain the conviction.

3. Whether the conduct of the prosecutor constituted prejudicial error.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was charged in a one count indictment returned in the Northern District of Illinois

with having wilfully attempted to evade and defeat his income taxes for the calendar year 1943, by filing a false and fraudulent tax return for that year, in violation of Section 145 (b) of the Internal Revenue Code. The indictment alleged that instead of the net income of $90,124.16 and tax liability of $60,355.36 shown on the return, the petitioner's actual net income for the year 1943 was $300,739.98 on which he owed a total tax of $253,674.82 (R. 2–3). After trial by a jury, the petitioner was convicted and was sentenced to a period of imprisonment of one year and one day and was fined $10,000 (R. 579–580).

Among the items of gross income shown in the indictment was one designated as "Other income", in the amount of $282,115.82 (R. 2–3). The petitioner requested a bill of particulars stating in detail which particular items of income were included in this sum of $282,115.82, by whom each such item was paid to the petitioner, and in what manner such payments were made, that is, whether by cash, check, goods, services, or other means (R. 8). The motion was allowed (R. 9), and in response to the order of the court, the Government filed a bill of particulars stating it was prepared to prove "that the defendant expended over reported income the amount alleged in the indictment", but that it did not possess the information necessary to specify in detail each item making up the total sum of $282,115.82, or by whom such item was paid, or the character,

manner and amount of such payment (R. 10–11). The petitioner then moved to dismiss the indictment (R. 11–12). Prior to any ruling on the motion to dismiss, the Government, by leave of court (R. 19), filed an amendment to its original bill of particulars and also a supplemental bill of particulars (R. 19–20). The amendment stated that the petitioner had expended an amount "in excess of the total of his available declared resources", during the calendar year 1943. The supplemental bill of particulars stated that the source of the "other income" alleged in the indictment was "the illegal sale of meat and meat products at over-ceiling prices to various persons", and that the details of these transactions were matters peculiarly within the knowledge of the petitioner. The petitioner's motion to dismiss the indictment was then denied (R. 21).

The evidence adduced by the prosecution showed that the petitioner was the president and controlling stockholder of the Empire Packing Company, which was engaged in the processing and sale of meat (Govt. Ex. 13; R. 84–85).

During the year 1943, the petitioner increased his personal net worth by $251,310.91 and made non-deductible expenditures for his personal use and benefit in the amount of $51,303.99—the increase plus the expenditures totaling $302,614.90 (R. 355–359). The "starting point" for the computation of the increase in net worth was January 1, 1942 (R. 358). The petitioner's assets, includ-

ing cash on hand (R. 351, 353), and his liabilities as of that date were determined from the petitioner's own books and records which had been submitted to the investigating agents for examination (R. 347, 348, 350). Those records, the accuracy of which the petitioner himself verified (R. 350), showed that his net worth on January 1, 1942, was $246,668.39 (R. 358). His net worth as of January 1, 1943, was determined by adding the amount of net income he reported on his 1942 return (after certain adjustments) to his net worth as of January 1, 1942 (R. 393), the computation resulting in a net worth of $282,227.66 for January 1, 1943 (R. 358). The petitioner's net worth as of December 31, 1943, was shown to be $533,538.57 (R. 359).

The difference of $251,311 between the net worth at the beginning and end of the year 1943 represented, in major part, the petitioner's investments in a farm which he acquired during that year. This farm was carried on petitioner's records at an original cost of $55,000 (R. 355), but the actual purchase price was shown to be $100,000 (R. 100), of which $79,000 was paid in currency of small denominations (R. 100, 106–107). There was other evidence to show a pattern of concealment of income. The petitioner expended a total of $283,464.99 in currency during the year 1943, at a time when he controlled several checking accounts (R. 356). He made expenditures totaling $151,909.24 of which

there was no record on his books (R. 356). Three bank accounts, two of which were in the name of an agent, were not recorded on petitioner's books, the total deposits to these accounts during 1943 amounting to $177,471.14 (R. 356–357). A nominee of the petitioner purchased cashiers' checks in the approximate amount of $35,000, with currency furnished to the nominee by the petitioner (R. 184–185). Certain checks of the Empire Packing Company were made payable to a nominee and then endorsed to the petitioner (R. 142–143). The petitioner placed dummy mortgages of $37,500 on his properties (R. 182), and falsified the amount of notes payable by him (R. 280–281, 357–358). Seven witnesses testified that during the year 1943 they paid over-ceiling prices for meat purchased from the Empire Packing Company, paying the excess in currency either to the petitioner directly or to one of two salesmen (R. 287–297, 300–305, 317–341). The salesmen testified that they turned over the excess payments to the petitioner (R. 276–283, 311–316), who directed one of them not to keep any records of such payments (R. 278).

On appeal, the judgment of conviction was affirmed by the Court of Appeals for the Seventh Circuit (R. 608).

ARGUMENT

1. The petitioner claims that the indictment should have been dismissed because there was a

fatal variance between it and the bill of particulars. This claim is predicated upon the contention that the bill of particulars, both in its original form and as amended and supplemented, disclosed on its face that the evidence to be introduced in support of the charges of the indictment was insufficient in law to prove the crime of attempted tax evasion. Since there is no claim that the nature of the evidence actually adduced upon trial differed from that which the amended and supplemental bills of particulars disclosed would be introduced, petitioner's contention on this score is, in essence, merely a variant of his argument that the evidence was not sufficient to prove the crime charged. The amended and supplemental bills of particulars apprised the petitioner that the unreported income charged to him would be proved by showing that he expended during the calendar year 1943 an amount in excess of the total of his declared available resources and that the source of this income was the illegal sale of meat and meat products at over-ceiling prices. The method of establishing additional income by showing that the private expenditures of a taxpayer during a certain period exceeded his available declared resources was expressly sanctioned by this Court in *United States* v. *Johnson,* 319 U. S. 503, 517. See also *United States* v. *Skidmore,* 123 F. 2d 604 (C. C. A. 7th), certiorari denied, 315 U. S. 800. There was thus no variance

between the indictment and the bills of particulars but rather the bills of particulars served to inform the petitioner of the nature of the evidence to be offered by the prosecution.

2. The petitioner bases his contention that the evidence was insufficient to sustain conviction upon two principal grounds: (a) There was no evidence, independent of the petitioner's extrajudicial admissions, to establish the petitioner's net worth at the time selected as a "starting point" for the net worth computation, and (b) the unreported income was not taxable to the petitioner under the rule of *Commissioner* v. *Wilcox*, 327 U. S. 404.

It is apparent from an examination of the record that the prosecution established petitioner's net worth by more than the required *quantum* of proof, and that it is "not a matter of tenuous speculation but of solid proof that there [was income] of a substantial amount which [Chapman] did not report." *United States* v. *Johnson*, 319 U. S. 503, 517. The "starting point" for the net worth computation was January 1, 1942. Evidence of the petitioner's assets and liabilities at that time was obtained from his own books and records, the accuracy of which he himself corroborated. These books and records constituted evidence independent of the petitioner's admissions, unless—and this would appear to be the position the petitioner now takes—the books and records themselves are to be con-

sidered extra-judicial admissions requiring corroboration. The case of *Warszower* v. *United States*, 312 U. S. 342, clearly reveals how tenuous is the position of petitioner in this respect. Warszower was convicted of the crime of using a United States passport which had been secured by a false statement. It was shown that on several occasions prior to the commission of the offense charged, Warszower had made statements inconsistent with those in his application for a passport. Upon appeal it was urged that the prior inconsistent statements were of no probative effect because they were uncorroborated. In rejecting this contention, this Court stated (p. 347):

> The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

Consequently, even on the assumption that books and records kept in the regular course of business are of no higher evidentiary value than the admissions in question in the *Warszower* case, the admissions contained in the petitioner's books and records as to his financial status on January 1, 1942, did not need to be corroborated, since the

admissions were obviously made many months prior to the commission of the offense charged in the indictment.

The petitioner also challenges the validity of the net worth computation on the ground that his net worth as of January 1, 1943, was ascertained by adding the amount of net income reported on his 1942 amended tax return (after certain adjustments) to his net worth as of January 1, 1942. It is said, in effect, that this injects an element of uncertainty into the computation, as perhaps petitioner's income for 1942 was greater than the amount he disclosed on his return for that year, and that if this were so, his net worth at the beginning of the year 1943 would also be greater, and the increase in his net worth during the year 1943 less than the amount shown by the Government's evidence. Such argument is, of course, highly speculative, and if it is to be accorded any significance at all, necessarily involves an admission that income for 1942 was understated. Aside from this consideration, however, it should be pointed out that the amended 1942 return was filed in September, 1943 (R. 354), which was prior to the commission of the offense charged (R. 2), and thus, under the *Warszower* rule, is entitled to the same probative weight as any other such admission.

The petitioner further urges that the conviction cannot be sustained because the over-ceiling payments which he received did not constitute taxable

income to him in the light of the ruling in *Commissioner* v. *Wilcox,* 327 U. S. 404. This Court there held that embezzled funds were not taxable to an embezzler because (1) he received the money "without any semblance of a bona fide claim of right"; (2) he was "under an unqualified duty and obligation to repay the money"; and (3) the victim "at all times held the taxpayer liable to return the full amount". (Pp. 408, 409.) These criteria bar the application of the *Wilcox* rule here.

The petitioner was the president and controlling stockholder of the Empire Packing Company, and the only other stockholder was inactive in the business. Under these circumstances, the petitioner, at the time he received the over-ceiling payments, did not do so with intent to steal or embezzle; the more reasonable inference is that he regarded them, or at least a substantial part of them, as his own property. The first test prescribed by the *Wilcox* case, namely, the taking "without *any semblance* of a bona fide claim of right" (italics supplied), has therefore not been met. The second and third criteria of the *Wilcox* case afford even less support to petitioner's position. The petitioner was certainly under no "unqualified duty and obligation to repay the money." nor did the corporation, of which the petitioner was the *alter ego,* at all times hold the petitioner liable to return the full amount of the over-ceiling payments. The Empire Packing Company could

not have had a direct action against the petitioner to recover the diverted funds, for there were not enough stockholders in a position to authorize such action. Even theoretically, the only recovery would have been by way of a derivative stockholder action, and this would not impose the unconditional obligation required by the *Wilcox* decision.[1]

As a practical matter, it is rather unreal to suppose that the corporation would assert, or have asserted for it, a claim to moneys which, if originally collected by the corporation, would have involved it in a violation of the Price Control laws. Even if such a claim were asserted, a court of equity would hardly entertain a derivative suit for moneys the collection of which would be illegal. Finally, the Court of Appeals for the First Circuit has held the *Wilcox* decision inapposite in a case very similar to the present one. *Currier* v. *United States,* 166 F. 2d 346.

3. The alleged prejudicial conduct of the prosecutor is claimed to have arisen out of the introduction of evidence relating to the petitioner's black market transactions and the references to those activities during the course of the argument to the jury. The evidence of black market transactions was introduced to show the source of peti-

[1] Cf. *National City Bank of New York* v. *Helvering,* 98 F. 2d 93 (C. C. A. 2nd), the effect of which has apparently been left unimpaired by *Commissioner* v. *Wilcox,* 327 U. S. at 409, fn. 7.

tioner's unreported income (R. 281). The prosecutor, in his argument, explicitly stated to the jury that such was the purpose of the evidence (R. 511–512). The court, in its charge, admonished the jury not to permit the kind of business in which the petitioner was engaged to prejudice them against him, and instructed them that the commission of an "offense against the laws of the United States other than that charged in the indictment creates no presumption that such defendant committed the offense here charged against him" (R. 555).

An examination of the record discloses that all of the remarks complained of were inferences logically drawn from the evidence in the case. The prosecutor may allude to the fact that the accused has committed crimes other than those for which he is on trial, where evidence supporting the particular reference is properly before the jury and the comment is a deduction from that evidence relevant to a material issue in the case. Likewise, he may refer to, and draw unfavorable inferences from, the conduct of the accused shown by evidence properly in the case, when those inferences are relevant to an issue material to the case. In making such comment, the prosecutor may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence in the case. *Baker* v. *United States,* 115 F. 2d 533 (C. C. A. 8th), certiorari denied, 312 U. S.

692; *Malone* v. *United States,* 94 F. 2d 281 (C. C. A. 7th), certiorari denied, 304 U. S. 562; *United States* v. *Wexler,* 79 F. 2d 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703.

The motion filed by the petitioner, prior to trial, to exclude evidence relating to black market activities was only a conditional one, premised on what the courts below have held to be petitioner's erroneous contention as to the nature of proof necessary for a conviction (R. 44–45).

No objection was made during the course of the argument to any of the remarks now claimed to be prejudicial (R. 506–518, 542–546).

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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